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2d Session

SENATE

REPORT
99-307

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 1987 FOR INTELLIGENCE ACTIVITIES OF THE UNITED STATES GOVERNMENT, THE INTELLIGENCE COMMUNITY STAFF, THE CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY SYSTEM (CIARDS), AND FOR OTHER PURPOSES

MAY 21 (legislative day MAY 19), 1986.—Ordered to be printed

Mr. DURENBERGER, from the Select Committee on Intelligence, submitted the following

REPORT

[To accompany S. 2477]

The Select Committee on Intelligence, having considered the original bill (S. 2477) authorizing appropriations for fiscal year 1987 for intelligence activities of the U.S. Government, the Intelligence Community Staff, the Centeral Intelligence Agency Retirement and Disability System, and for other purposes, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

This bill would:

(1) Authorize appropriations for fiscal year 1987 for (a) intelligence activities of the United States, (b) the Intelligence Community Staff, and (c) the CIA Retirement and Disability System;

(2) Authorize the personnel ceilings as of September 30, 1987 for (a) the Central Intelligence Agency, (b) the Intelligence Community Staff, and (c) the other intelligence activities of the U.S. Government;

(3) Authorize the Director of Central Intelligence to make certain personnel ceiling adjustments when necessary to the performance of important intelligence functions;

(4) Make several legislative changes designed to enhance intelligence and counterintelligence capabilities and to promote the more effective and efficient conduct of intelligence and counterintelligence activities.

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OVERALL SUMMARY OF COMMITTEE ACTION

[In millions of dollars]

	Fiscal year 1986	Fiscal year 1987 budget request	Committee recommends	Committee recommended changes
Intelligence activities				
Intelligence Community staff	$22.1	$22.9		
CIARDS	101.4	125.8	$125.8	0
Total				

The Classified Supplement to the Committee Report

The classified nature of U.S. intelligence activities prevents the Committee from disclosing the details of its budgetary recommendations in this Report.

The Committee has prepared a classified supplement to the Report, which describes the full scope and intent of its action. The Committee intends that the classified supplement, although not available to the public, will have the full force of a Senate Report, and that the Intelligence Community will comply fully with the limitations, guidelines, directions, and recommendations contained therein.

The classified supplement to the Committee Report is available for review by any Member of the Senate, subject to the provisions of Senate Resolution 400 of the 94th Congress.

Scope of Committee Review

The Committee conducted a detailed review of the Intelligence Community's fiscal year 1987 budget request. This included:

—Hearings involving some 9 hours of testimony from major consumers of intelligence product, including: the Secretary of Defense; the Commander in Chief Strategic Air Command; the Director of Operations for the Joint Chiefs of Staff; and the Assistant Secretary of State for European Affairs.

—Hearings involving some 30 hours of testimony from the principal program managers for U.S. Intelligence, including: the Director and Deputy Director of Central Intelligence; the Director, Intelligence Community Staff; the Director, Defense Intelligence Agency; the Director, National Security Agency, senior officials of the Military Departments; the Director, Federal Bureau of Investigation; and the Director, State Department Bureau of Intelligence and Research;

—Hearings involving some 9 hours of testimony from senior Defense tactical intelligence program managers and Directors of Defense Department and other governmental Security programs;

—Detailed examination of over 3,000 pages of budget justification material provided by national and tactical intelligence program managers and all major governmental security activities;

—Review of written answers from various officials to several hundred questions for the record; and,

—Numerous briefings and interviews with officials on major topics of interest.

The Committee conducted a long range examination of the U.S. intelligence system through a careful review of the National Intelligence Strategy prepared by the Director of Central Intelligence. This Strategy, specifically requested by the Conferees in conjunction with the Fiscal Year 1986 Intelligence Authorization Act, projected the challenges and requirements that will face U.S. intelligence over the next decade, identified the intelligence programs and activities necessary to meet those challenges, and set forth a plan for the acquisition of needed capabilities taking into account the tight fiscal environment faced by all government activities.

During the course of this review, the Committee focused careful attention on the following major intelligence requirements:

—The provision of detailed information required for the United States to maintain an effective, assured, nuclear deterrent in the years ahead;

—The provision of timely and focused information in support of U.S. military operations and diplomacy worldwide;

—The monitoring of foreign events to provide the senior U.S. policymakers with adequate warning of developments inimical to U.S. or allied interests, so as to permit development of effective policy options; and,

—Protection of U.S. foreign policy and military activities from an increasingly sophisticated foreign intelligence threat.

Committee Findings and Recommendations

In previous years the Committee has reported its judgment that intelligence activities must be assigned a very high priority in overall national security investment. The Congress has heeded this advice and provided significant increased investment in intelligence programs in all but one of the last 7 years. These investments are now beginning to pay off in the provision of effective intelligence support in an increasingly dangerous world environment. However, in order to bring to fruition the improved intelligence system these investments anticipated, and develop other new capabilities demanded by the activities of our adversaries, additional continued investment will be required.

The Committee is deeply concerned about the future health of U.S. intelligence, largely due to constraints now facing the Defense budget, where, for reasons of security, Intelligence programs are financed. In Fiscal Year 1986, Intelligence Community investment actually declined in real terms, forcing the cancellation of a number of important activities and deferral and stretchout of many others. This situation, coupled with the tragic loss of the Space Shuttle Challenger and the consequences arising from the Titan 34D launch vehicle explosion in April 1986, combine to place U.S. intelligence in its most serious crisis in decades.

The Committee's review of the DCI's National Intelligence Strategy, his Fiscal Year 1987 budget request, and the requirements levied by the Defense and foreign policy community on intelligence program managers, convince the Members that Intelligence investment must be protected from arbitrary limits on government

spending in general and Defense spending in particular. We come to this conclusion with great difficulty and with full knowledge that similar claims will be made about other government programs in this time of fiscal constraint. However, it must be remembered that the secrecy required for the conduct of effective intelligence and security programs leaves these activities by necessity with only one constituency; namely, those on the Intelligence Committee who must review intelligence plans behind closed doors.

The recommendations set forth by the Committee in the Classified Supplement to this report represent the minimum essential investments that must be made to preserve and improve U.S. Intelligence in a manner consistent with the world environment facing U.S. national security. This judgment is objective, bipartisan, and strongly held.

SECTION-BY-SECTION ANALYSIS

TITLE I—INTELLIGENCE ACTIVITIES

Section 101 lists the departments and agencies for whose intelligence activities the bill authorizes appropriations for fiscal year 1987.

Section 102 makes clear that, with the exception of sections 201, 202(a), and 301, the amounts authorized to be appropriated and the personnel ceilings established by the bill for fiscal year 1987 are contained in a classified Schedule of Authorizations. This Schedule of Authorizations is incorporated into the bill by this section.

CENTRAL INTELLIGENCE AGENCY RESERVE FOR CONTINGENCIES

The Committee would review with great concern the use of the Central Intelligence Agency's reserve fund for contingencies to support covert actions when such proposed actions have not received the concurrence of at least one of the two intelligence oversight committees. In the event one of the committees objects to a program, the President should take that committee's concerns fully into account in his final decision.

The Committee believes that the Executive branch should not proceed with a covert action program that is opposed by both intelligence committees. If such action were to be taken by the Administration, the Committee would consider placing statutory restrictions on use of the reserve fund.

Section 103 permits the Director of Central Intelligence to authorize the personnel strength of any intelligence element to exceed its fiscal year 1987 authorized personnel level by no more than 2 percent if he determines that doing so is necessary for the performance of important intelligence functions. The Director must notify the two intelligence committees promptly of any exercise of authority under the section.

It is to be emphasized that the authority conveyed by this section is not intended to permit the wholesale raising of personnel strength in each or any intelligence component. Rather, the section provides the Director of Central Intelligence with flexibility to adjust personnel end strength temporarily for contingencies and for overages caused by an imbalance between hiring of new em-

ployees and attrition of current employees for retirement, resignation, etc. The Committee does not expect the Director of Central Intelligence to allow heads of intelligence components to plan to exceed personnel levels set in the schedule of authorizations except for the satisfaction of clearly identified hiring needs which are consistent with the authorizations of personnel strengths in this bill. In no case is the authority in section 103 to be used to provide for positions denied by the Congress.

TITLE II—INTELLIGENCE COMMUNITY STAFF

Section 201 authorized the appropriation of $22,338,000 for the Intelligence Community Staff. After careful review of the budget request, the Committee believes that this amount is sufficient for the staff to meet its responsibility of providing the Director of Central Intelligence with staff assistance to carry out his Intelligence Community responsibilities. The Staff supports the DCI in the execution of his responsibilities to develop, review, and approve the National Foreign Intelligence Program budget, to evaluate the performance of foreign intelligence activities, and to develop issues, goals, and other required guidelines for the Intelligence Community.

Section 202 and 203 provide certain administrative authorities for the Intelligence Community Staff. Section 202(a) authorizes full-time personnel for the staff as of September 30, 1987. The Intelligence Community Staff is composed of a permanent cadre, detailed community personnel, and contract hirees.

The Intelligence Community Staff is now made up of personnel who are permanent employees of the Staff and others who are detailed for several years from various intelligence elements. The purpose of section 202(b) is to authorize this staff approach and to require that detailed employees represent all appropriate elements of the Government.

Section 202(c) requires that personnel be detailed on a reimbursable basis except for temporary situations. The Staff's authorized size, in the opinion of the Committee, is sufficient for the duties which the Staff performs. This provision is intended to insure that its ranks are not swelled by detailees, the personnel costs for whom are not reimbursed to their parent agency.

Section 203 provides that the Director of Central Intelligence shall use certain statutory authority to manage the activities and to pay the personnel of the Intelligence Community Staff. However, it is the Committee's intent that in the case of detailed personnel, the DCI's authority to discharge personnel shall only extend to discharging detailed personnel from service at the Intelligency Community Staff and not from Federal employment or military service.

INTELLIGENCE COMMUNITY STAFF

	Amount (millions)	Full-time personnel
Fiscal year:		
1986 program	$21.0	227
1987 program	22.9	246

INTELLIGENCE COMMUNITY STAFF—Continued

	Amount (millions)	Full-time personnel
Committee recommended change	.6	—7
Committee recommendation	22.3	239

TITLE III—CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY SYSTEM

Section 301 authorizes appropriations for the Central Intelligence Agency Retirement and Disability System (CIARDS) in the amount of $125,800,000 for fiscal year 1987. The Central Intelligence Agency Retirement Act of 1964 for Certain Employees (Public Law 88-643) authorized the establishment of CIARDS for a limited number of Agency employees and authorized the establishment and maintenance of a fund from which benefits would be paid to qualified beneficiaries.

The benefits structure of CIARDS is essentially the same as for the Civil Service Retirement System, with several special provisions. These special CIARDS provisions are: (a) annuities based upon a straight 2 percent of high 3-year average salary for each year of service, not exceeding 35; (b) under stipulated conditions a participant may retire at age 50 with 20 years of service, or a participant with 25 years of service may be retired by the Director regardless of age; and (c) retirement is mandatory at age 65 for personnel receiving compensation at the rate of GS–18 or above, and at age 60 for personnel receiving compensation at a rate less than GS–18, except that the Director may, in the public interest, extend service up to 5 years.

Annuities to beneficiaries are provided exclusively from the CIARDS fund, which is maintained through: (a) contributions, currently at the rate of 7 percent, deducted from basic salaries of participants; (b) matching Agency (employer) contributions from the appropriation from which salaries are paid, based on the actual rate of contributions received from participants; (c) transfers from the Civil Service Retirement and Disability Fund representing employee and matching employer contributions for service of Agency employees prior to the date of their participation in CIARDS, and contributions for service of integrated Agency employees included in CIARDS following termination of integrated status; (d) income on investments in U.S. Government securities; and (e) beginning in 1977, direct appropriations consistent with the provisions of Public Law 94-552.

Central Intelligence Agency Retirement and Disability System

Fiscal year:	*Millions*
1986 program	$101.4
1987 request	125.8
Committee recommended change	0
Committee recommendation	125.8

TITLE IV—ADMINISTRATIVE PROVISIONS RELATED TO ITELLIGENCE AGENCIES

Section 401 exempts classified Central Intelligence Agency and National Security Agency record destruction schedules from the requirement contained in subsection 3303a of Title 44, United States Code, that the Archivist may approve records disposal requests only after publication of notice in the Federal Register and an opportunity for interested persons to submit comments thereon.

The requirement that the Archivist publish record disposal requests in the Federal Register was added by subsection 204 of the National Archives and Records Administration Act of 1984. Requiring the Archivist to provide notice in the Federal Register gives the public an opportunity to comment on the schedule of records proposed for destruction. While the purpose of the provision was to give the public a role in determining what records should be destroyed, the legislative history makes clear that Congress did "not intend . . . for such public notice to be a paperwork burden for any affected parties or to unreasonably delay the disposal of such records." (House Report 98–1124, pp. 29–30; this is the Conference Report on the legislation.)

Unfortunately, the requirement for publication in the Federal Register has become a paperwork burden for CIA and NSA that has unreasonably delayed disposal of these agencies' records. The problem arises because the CIA and NSA record control schedules submitted to the National Archives and Records Administration (NARA) are classified. NARA has determined that the Federal Register notice concerning classified records schedules will be limited to the identity of the requesting agency, the NARA job number assigned to the schedule, and the reason the schedule is excluded from public disclosure.

Because CIA and NSA record destruction schedules generally are classified the statutory requirement that the Archivist publish notice of them in the Federal Register serves little purpose. Furthermore, this requirement delays approval by the Archivist of NSA and CIA record destruction schedules, because the public is given 60 days to comment on the notice in the Federal Register. Exempting classified CIA and NSA record destruction schedules from the provision requiring notice in the Federal Register of requests to destroy records would expedite the process of approval of requests to dispose of records, and would not deprive the public of any meaningful information. Section 401 would have no affect on unclassified record disposition schedules.

Section 402 extends by two fiscal years certain authority of the Secretary of Defense granted by subsection 501(a) of the Intelligence Authorization Act for Fiscal Year 1985, P.L. 98–618. This legislation authorized the Secretary of Defense to terminate the employment of any civilian officer or employee of the Defense Intelligence Agency (DIA) whenever such action was considered by the Secretary to be in the best interests of the United States and he determined that the termination procedures otherwise authorized by law could not be "invoked in a manner consistent with the national security." As enacted, paragraph 1604(e)(1) of Chapter 83 of title 10, United States Code, granted this authority to the Secretary

of Defense for fiscal year 1985 and 1986. Regulations were subsequently written to implement the authority and are now in the final stages of coordination within the Department of Defense. The extension of authority is designed to allow DIA an opportunity to have two full fiscal years of experience under the implementing regulations. Then, as the end of the extended time period draws near, a determination can be made as to whether the termination authority should be modified and/or enacted into permanent law. The Committee notes with displeasure that the Department of Defense has taken a year and a half to come up with regulations to implement a statutory grant of authority the enactment of which was represented to be a matter of considerable urgency when the Committee considered this matter in 1984. Failure to implement such authorities in a timely fashion subsequent to enactment cannot help but adversely affect the Committee's attitude toward future legislative proposals of this kind.

Section 403 clarifies and enacts into permanent law authority for the Department of Defense, through the Defense Mapping Agency (DMA), to conduct mapping activities in conjunction with foreign countries. Currently, DMA has 185 international executive agreements with 75 countries concerning the exchange, collection, and production of mapping data. Some of these agreements have been in existence since the early 1940's. Specifically, these agreements permit (1) the exchange of maps, charts and other geodesic information, (2) co-production and collection of mapping data, (3) loan of DMA equipment so that foreign mapping agencies can produce raw data more efficiently and accurately, (4) DMA training of foreign personnel, and (5) access to foreign countries.

DMA finds it necessary to deal with foreign map agencies to the extent that U.S. technical collection systems cannot provide accurate cartographic data. To fill such gaps, DMA can send teams of U.S. personnel to do necessary work on the ground. The cost of deployments of U.S. personnel can, however, be prohibitive. It is far less expensive to use local foreign mapping agencies. When local mapping personnel are used, the U.S. sends them the specialized equipment and provide the necessary training as set forth in the executive agreement.

In exchange, the United States gets significant raw mapping data as well as access to the territory of another sovereignty. Over the years this has been a low cost, reliable, and convenient way for DMA to fulfill its mission. It should also be emphasized that in many instances this is the only practical way to get mapping data from foreign countries. The data and other materials provided to the United States through such agreements is estimated to be valued in excess of $80 million annually.

The authority of DMA to engage in such arrangements with other countries has, however, been called into question. Technically, DMA lacks explicit statutory authority to undertake these agreements, and it currently relies exclusively on inherent executive authority. Recent changes in statutory law have introduced an element of uncertainty in this reliance. P.L. 97-113 prohibits no-cost loan of defense equipment. In addition, both the Arms Export Control Act and the Foreign Assistance Act require foreign governments to reimburse the Defense Department for any foreign train-

ing. Neither the cost avoidance of DMA's use of foreign personnel, nor the $80 million valuation of mapping data provided by foreign countries can be calculated as reimbursement. In combination, these laws render DMA's reliance on inherent executive authority as the legal basis for its international agreements somewhat uncertain. To remedy this problem section 403 grants DMA explicit statutory authority to continue to exchange mapping data, supplies and services with foreign countries.

Section 404 provides DIA with authority to pay for necessary medical evacuations of DIA civilian employees stationed overseas. Section 501 of the Intelligence Authorization Act for Fiscal Year 1984, P.L. 98-215, authorized allowances and benefits for certain employees of DIA stationed overseas comparable to those provided to officers and employees of the Foreign Service serving overseas. However, the authority to pay the costs or expenses incurred for a medical evacuation of a civilian employee when there is no suitable person or facility in the overseas locality to provide necessary medical care was not included in the list of benefits provided by section 501. The authorities in section 501 of P.L. 98-215 were reenacted as Section 1605 of title 10, United States Code, by subsection (a) of section 1302 of the Department of Defense Authorization Act, 1986, P.L. 99-145. The medical evacuation authority is currently available with respect to Foreign Service officers and employees, and to CIA and NSA civilian employees (see section 4 of the CIA Act of 1949, 50 U.S.C. 403(e) and paragraph 9(b)(1) of the National Security Agency Act of 1959, 50 U.S.C. 402 note, respectively). While it is fortunate that there is rarely the need to have such authority, DIA has experienced necessary medical evacuations of its civilian employees stationed overseas. Should similar circumstances arise in the future, payment for medical evacuation of DIA civilian employees should be handled on the same basis as for other civilian intelligence and diplomatic employees similarly situated.

Section 405 would permit the use of proceeds from military counterintelligence operations to offset necessary and reasonable expenses incurred in these kinds of operations. Current law (31 U.S.C. 3302) can be interpreted to require that funds paid by a foreign counterintelligence service to a counterintelligence double agent must be deposited in the U.S. Treasury. However, the established practice by counterintelligence components of the U.S. military has been to use such funds for double agent operations.

An opinion by the General Counsel of the Defense Department advises that under current permanent law the proceeds from double agent operations should be paid into the Treasury. Legislation is therefore required to make clear that money paid by foreign counterintelligence services to our military counterintelligence double agents can be used to defray reasonable and necessary operational expenses. Such usage is important to operational security, maintenance of agent bona fides, and for compensating double agents for legitimate expenses associated with operational activity. Section 405 also will avoid having to use appropriated funds to pay operational expenses that have previously been defrayed by using money paid to double agents by foreign intelligence services.

An exemption from 31 U.S.C. 3302 for fiscal year 1986 was enacted for Defense counterintelligence components under Section

701 of the Intelligence Authorization Act for Fiscal Year 1986. Section 405 makes this provision permanent.

Section 406 provides survivor benefits for certain former spouses of CIA employees who did not benefit from the Central Intelligence Agency Spouses' Retirement Equity Act of 1982 (P.L. 97-269, Title VI) because they were divorced prior to the effective date of that Act (November 15, 1982).

The CIA Spouses' Retirement Equity Act granted certain former spouses of CIA employees a presumptive entitlement, subject to revision by spousal agreement or by State courts in divorce proceedings, to a pro rata share of the employees' retirement annuities, survivor benefits, and lump-sum disbursements paid from the retirement fund. Former spouses qualified for the presumptive entitlement were those married to a CIA employee during at least ten years of the employee's creditable government service, at least five years of which they spent outside the United States. The Congress provided the benefits to these spouses in recognition of their years of support of the unusual professional activities abroad of their CIA employee spouses and their own direct contributions to fulfillment of the mission of the CIA. Both the requirements of their support to their CIA employee spouses and their direct contributions often prevented the former spouse from acquiring marketable job skills and pension rights and imposed familial pressures and tensions which often contributed to the breakdown of their marriages.

When the Committee considered the legislation which became the CIA Spouses' Retirement Equity Act, it noted that, because the benefits of the Act were prospective only, spouses divorced prior to the effective date of the Act would not benefit, despite their important contribution. The committee noted that ". . . at some future date the Congress may wish to consider providing additional benefits to this group in recognition of their important service." (S. Rept. 97-484, p. 15) The Committee believes that the time has arrived to provide to this group of former spouses of CIA personnel the benefits they deserve and thus includes Section 407 in the bill.

Section 406(a) adds a new Section 224 to the Central Intelligence Agency Retirement Act of 1964 for Certain Employees (50 U.S.C. 403 note) to provide survivor benefits for certain former spouses of CIA personnel divorced prior to November 15, 1982.

Section 224(a) of the CIA Retirement Act as contained in the bill provides a survivor annuity to a "former spouse" of a CIA employee who was a participant or former participant in the CIA Retirement and Disability System (CIARDS), if they were divorced prior to November 15, 1982, the effective date of the CIA Spouses' Retirement Equity Act of 1982. The term "former spouse" as defined in Section 224(b) of the CIA Retirement Act includes only a former wife or husband of a present or former CIARDS participant who was married to the participant during at least 10 years of his creditable service, at least 5 years of which were spent together outside the United States. The survivor annuity is paid in an amount equal to 55% of the greater of (1) the full amount of the present or former participant's annuity or (2) the full amount of what the present or former participant's annuity would have been if not for the participant's withdrawal of lump-sum portions of contributions made with respect to the participant's annuity; the amount is re-

duced by the amount of any federal government annuity (other than Social Security benefits) the former spouse receives that is attributable to the former spouse's own employment by the United States.

Section 224(b) of the CIA Retirement Act as contained in the bill disqualifies an othewise qualified former spouse from receiving the survivor annuity benefit if (1) the present or former participant to whom the former spouse was married has elected under Section 223 of the CIA Retirement Act to provide a survivor annuity to the former spouse, (2) the former spouse remarries before age 55, or (3) the former spouse is less than 50 years of age.

Section 224(c) of the CIA Retirement Act as contained in the bill specifies rules for determining the dates upon which the survivor annuities to former spouses shall commence and terminate and provides for application to the Director of Central Intelligence for such annuities.

Section 224(d) of the CIA Retirement Act as contained in the bill requires the DCI to issue implementing regulations and, to the extent practicable, notify former spouses of their rights under Section 224. Regulations issued by DCI under Section 224(d) will be submitted to the intelligence committee of the Congress before they take effect, as required by Section 201(a) of the CIA Retirement Act.

Section 406(b) of the bill makes a conforming amendment to Section 14(a) of the CIA Act of 1949 to ensure that former spouses of CIA employees who participated in a federal retirement system other than the CIA Retirement and Disability System (CIARDS), receive the same benefits as former spouses if CIA employees who participated in the CIARDS on the same basis. The same benefit eligibility requirements regarding years of marriage and overseas service that applied under the CIA Spouses' Retirement Equity Act of 1982 apply to benefits for former spouses of both CIARDS and non-CIARDS employees under the amendments made by Section 407.

Section 406(c) provides for funding the survivor benefits granted by the amendments to the CIA Retirement Act of 1964 for Certain Employees and the CIA Act of 1949 by subsections 407(a) and (b).

Section 406(d) provides an effective date of October 1, 1986 for the amendments made by section 407 to the CIA Retirement Act of 1964 for Certain Employees and the CIA Act of 1949.

Section 407 adds a new Section 16 to the Central Intelligence Agency Act of 1949 permitting a former spouse of a CIA employee to enroll in a federal employee health benefits plan (see chapter 89 of title 5, United States Code) if they were divorced prior to May 7, 1985. To qualify, the former spouse must have been married to the CIA employee during at least 10 years of the employee's creditable service, at least 5 years of which were spent together outside the United States, and must have been covered under a federal health benefits plan as a member of the family of the CIA employee at some time during the 18 month period before the divorce or annulment became final. The eligible former spouse need not enroll in the same plan as that which covered the spouse at some time during that 18 month period.

The eligible former spouse may enroll for self alone or self and family during a special enrollment period beginning on the date of enactment of this legislation and ending 6 months thereafter, except that the Director of the Office of Personnel Management shall waive the 6 month limitation when the Director of Central Intelligence notifies him that circumstances so warrant.

The legislation disqualifies an otherwise eligible former spouse from enrolling in a health plan if (1) the spouse remarries before age 55 or (2) the spouse already is enrolled in a federal health benefits plan.

The Director of the Office of Personnel Management is to prescribe the regulations for enrollment and payment by eligible former spouses. DCI will determine the identities and addresses of eligible former spouses and notify them of their health plan benefit rights.

The Committee limited the eligibility for health plan enrollment under this section to former spouses divorced prior to May 7, 1985 because similarly situated former spouses divorced after that date are eligible already for such benefits under the Civil Service Spouse Retirement Equity Act of 1984 (P.L. 98-615).

For health plan coverage under the amendment made by Section 407 the former spouse pays both the amount a federal employee would pay for the same benefit and the amount that the federal government would contribute on behalf of the federal employee. Thus, since the former spouses pay the equivalent of both an employee's contribution and the government's associated contribution, the former spouses receive the health plan benefit at no cost to the government, other than incidental costs associated with administration.

Section 408 enacts a new section 11 to the National Security Agency Act of 1959 to provide for effective physical security of NSA installations within the United States. Currently, officers of the Federal Protective Service of the General Services Administration (GSA) provide physical security at NSA facilities. For a number of reasons, the General Services Administration has been unable to handle this function adequately. It would be preferable for NSA to assume from GSA responsibility for the physical security of NSA installations. Section 408 grants to NSA physical security personnel powers currently exercised by GSA personnel performing that function. Thus, Section 408 will enable the NSA to assume from the General Services Administration responsibility for physical security at NSA installations.

NSA expects to realize significant budget savings by providing its own physical security in lieu of paying GSA to do so. It is expected that NSA physical security personnel positions will be counted within the authorized end-strengths for NSA personnel provided in the annual intelligence authorization acts.

The transfer of physical security authority and responsibility from GSA to NSA could be accomplished by GSA delegating its authority to the CIA. The Departments of Justice, Labor, and Transportation, for example, provide their own physical security under delegations of authority from GSA. The Committee believes, however, that it is more appropriate to provide a clear legislative grant of these powers to NSA physical security personnel.

Section 408 will give NSA physical security personnel designated by the Director the same limited law enforcement powers that GSA special policemen, which is the statutory term for Federal Protection Officers, currently possess under Section 318 of title 40, United States Code. NSA physical security personnel will have those limited powers only when they are within the boundaries of installations owned, leased, occupied, or otherwise used by the NSA.

Under Section 408, the Director of the National Security Agency is authorized to issue rules and regulations with respect to NSA property and to establish penalties for their violation. Designated NSA security personnel will be responsible for enforcing such rules and regulations. It is expected that the Director will adopt regulations which are as similar as possible to those promulgated by the Administrator of General Services with respect to other federal installations, consistent with the functions and requirements of NSA installations. Section 408 specifies that the penalties established by the Director for violations of the rules and regulations promulgated with respect to NSA installations shall not exceed those specified in 40 U.S.C. 318(c) with respect to other federal installations.

Section 408 requires that NSA security personnel performing the physical security functions at NSA installations be clearly identifiable as United States Government security personnel. This requirement ensures that members of the public entering upon any NSA installations will have due notice of the legal authority of the designated NSA physical security personnel.

Section 408 will enable NSA guards to stop, detain, and question persons found on Agency property without reasonable explanation, and to conduct physical searches and make arrests on Agency facilities in appropriate circumstances. But the limited authority conferred by Section 408 does not extend beyond Agency facilities. For example, NSA security officers would not be empowered under section 408 to conduct physical searches of persons and property located outside Agency premises in connection with an investigation of stolen classified documents. Nor does section 408 authorize any expansion of Agency intelligence collection activities that are governed by Executive Order 12333 and related procedures.

It is expected that the Director will submit any regulations he may adopt pursuant to section 408 to the intelligence committees at least 30 days before they are intended to become effective.

It also is expected that the Agency will give prior notice to the intelligence committees before deploying its own guards to any locations other than the NSA headquarters complex.

Present section 11 of the National Security Agency Act authorizes the Director of NSA to call upon the GSA to provide the Agency with FPS guards, and 40 U.S.C. subsection 318(b) authorizes the GSA to provide such guards when called upon to do so. Section 408 repeals existing section 11 and substitutes a new section as described above.

The new section 11 of the NSA Act is patterned directly on section 15 of the CIA Act of 1949 (50 U.S.C. 503o), which was enacted in section 401 of the Fiscal Year 1985 Intelligence Authorization Act.

Coast Guard Attachés

The Committee endorses the assignment of Coast Guard personnel to Defense Attache Offices whenever their assignment can help obtain information important to the Attachés' responsibilities. Coast Guard personnel assigned in this manner will be subject to all applicable provisions of law and the provisions of E.O. No. 12,333 on intelligence activities, and fully accountable to the Committee for oversight purposes.

TITLE V—ENHANCED FBI COUNTERINTELLIGENCE AUTHORITIES

The Select Committee on Intelligence announced in June, 1985, that it was conducting a comprehensive review of the Soviet intelligence threat and U.S. counterintelligence and security programs. As part of the review, the Committee held a series of closed hearings to examine the nature and extent of the hostile intelligence threat and the need for improvements in U.S. counterintelligence and security programs. In response to Members' requests, FBI Director Webster agreed to submit proposals for new legislation necessary to enhance the FBI's counterintelligence capabilities. Director Webster identified as the FBI's highest priorities: (1) improved access to financial records in counterintelligence investigations; (2) improved access to telephone toll records in counterintelligence investigations; and (3) improved access to state and local criminal records in background investigations. The Administration subsequently endorsed these proposals, which are the basis for the provisions of this title to enhance FBI counterintelligence authorities.

Financial Records

Section 501 amends Section 1114(a) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414(a)) to grant the FBI authority to obtain a customer's or entity's records from a financial institution for counterintelligence purposes if the Director of the Federal Bureau of Investigation (or the Director's designee) finds that there are specific and articulable facts giving reason to believe that the customer or entity is or may be a foreign power or an agent of a foreign power as defined in the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801). The FBI bears primary responsibility for counterintelligence in the United States and thus devotes substantial resources to countering espionage activities and international terrorism activities of hostile foreign powers.

For hostile foreign powers to create, support, and operate an espionage network or terrorist network takes money. Financial records relating to espionage or terrorist activities can provide the FBI with the information it needs to prevent such activities or render them ineffective. The FBI does not currently possess mandatory authority for access to the financial records of foreign powers and their agents under the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.), which governs access to customers' records held by financial institutions. Section 501 provides the mandatory access the FBI needs to perform its counterintelligence functions effectively. (*United States* v. *Miller*, 425 U.S. 435 (1976)) In response to the Supreme Court's decision, the Congress enacted the Right to

Financial Privacy Act (RFPA) of 1978 (12 U.S.C. 3401 et seq.). That Act generally provides that, when the Government seeks the records of a customer of a financial institution which are relevant to a legitimate law enforcement inquiry, it must employ a subpoena or formal written request reviewable in court, or obtain a search warrant. Thus, the customer receives notice of the Government's request for the records and an opportunity to contest the Government's request in court.

In contrast to the general provisions of the RFPA which require notice to the customer of a governmental request for records and an opportunity to litigate, Section 1114(a) of the RFPA governing intelligence and counterintelligence agencies' requests for financial records does not provide for notice and an opportunity to litigate and, indeed, prohibits financial institutions from giving notice to the customers whose records are requested. The FBI could not effectively monitor and counter the clandestine activities of hostile espionage agents and terrorists if it had to notify them that the FBI sought their financial records for a counterintelligence investigation.

Currently under Section 1114(a) of the RFPA, to gain access to financial records for counterintelligence investigations, the FBI issues a letter, called a "national security letter," signed by an appropriate supervisory official and certifying compliance with the applicable provisions of the RFPA, seeking financial records relevant to FBI counterintelligence activities. The RFPA requires the financial institution receiving the request to keep secret that the FBI sought or obtained access to the records. Section 1114 currently does not, however, mandate that financial institutions comply with FBI requests for access to the financial records under the intelligence provisions of the RFPA; it merely permits the banks to do so if they so choose, without regard to other provisions of the RFPA.

The FBI has stated that most financial institutions cooperate with the FBI in making financial records available in accordance with Section 1114(a) of the RFPA. However, the FBI has advised the Committee that in certain significant instances, financial institutions have declined to grant the FBI access to financial records in response to requests under Section 1114(a). The FBI informed the Committee that the problem occurs particularly in States which have State constitutional privacy protection provisions or State banking privacy laws. In those States, financial institutions decline to grant the FBI access because State law prohibits them from granting such access and the RFPA, since it permits but does not mandate such access, does not override State law. In such a situation, the concerned financial institutions which might otherwise desire to grant the FBI access to a customer's records will not do so, because State law does not allow such cooperation, and cooperation might expose them to liability to the customer to whose records the FBI sought access. Section 510, by providing for mandatory FBI access to a customer's or entity's financial records for counterintelligence purposes in certain circumstances, preempts State law to the contrary which otherwise would not permit such access. The mandatory nature of the provisions also protects financial institutions from the possibility of liability to customers or en-

tities under State privacy law. The Committee notes also that financial institutions located in the United States which are organized or doing business in foreign countries may be subject to, or may believe themselves to be subject to, foreign bank secrecy laws. The Committee intends that the mandatory provisions contained in section 501 of the bill override conflicting foreign law.

Section 501 amends Section 1114(a) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414(a)) by adding to it a new paragraph (5).

Paragraph 1114(a)(5)(A) as added by section 501 provides that financial institutions shall comply with an FBI request for access to financial records upon receiving the certificate in writing of the Director of the FBI (or the Director's designee) that the FBI seeks the records for foreign counterintelligence purposes and that there are specific and articulate facts giving reason to believe that the customer or entity whose records are sought is or may be a foreign power or an agent of a foreign power as defined in the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801). The provision provides for mandatory access to financial records not only of a "customer" (which under the limited definition in Section 1105 of the RFPA includes only individuals and partnerships of five or fewer individuals), but also to records of an "entity," which includes all forms of organization, such as partnerships, associations, corporations, and governments. The term "foreign counterintelligence purposes" includes both the purpose of countering the intelligence activities of foreign powers and their agents and the purpose of countering international terrorist activities.

The Committee expects that, if the Director of the FBI delegates his function under this provision for mandatory access, he will delegate it no further down the FBI chain of command than the level of Deputy Assistant Director.

The new mandatory FBI authority for counterintelligence access to records is in addition to, and leaves in place, the existing non-mandatory scheme for FBI access under Section 1114(a)(1). Although the existing non-mandatory authority under Section 1114(a) to request a customer's financial records for counterintelligence activities apparently implicitly requires only that such records be relevant to such activities regardless of the status or activities of the customer, the Committee believes it important in establishing the additional authority for mandatory FBI access to limit that mandatory authority to use only to obtain a customer's or entity's records when there are specific and articulable facts giving reason to believe that the customer is or may be a foreign power or an agent of a foreign power. The Committee notes that the requirement of "reason to believe" that the customer is or may be a foreign power or an agent of a foreign power is less stringent than the requirement of "probable cause." Statutes and executive orders governing intelligence activities have used the "probable cause" standard when intelligence methods or techniques the government proposes to use intrude into zones of privacy protected by the fourth amendment. Since, as the *Miller* case held, governmental access to a customer's financial records held by a bank does not implicate a constitutionally protected right of privacy, the Committee concluded that the "probable cause" standard was not warranted. Neverthe-

less, the Committee believed that satisfaction of an elevated standard should be a predicate for a mandatory FBI access to financial records, in light of the judgment of the Congress embodied in the RFPA that financial records should be afforded a measure of privacy against governmental inquiry. Accordingly, the Committee agreed to require a determination that there are specific and articulable facts giving "reason to believe" that the customer or entity whose records the FBI seeks is or may be a foreign power or an agent of a foreign power.

Paragraph 1114(a)(5)(B) of the RFPA as added by section 501 of the bill provides that the FBI may disseminate information obtained pursuant to the mandatory access provisions only as provided in the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations, and, with respect to dissemination to an agency of the United States, such as another federal law enforcement or intelligence agency, only if the FBI determines that such information is clearly relevant to the authorized responsibilities of such agency. The requirement of clear relevancy for dissemination to another federal agency ensures that the FBI will not automatically and routinely disseminate information the FBI obtains from a customer's or entity's financial records using the mandatory procedures.

Paragraph 1114(a)(5)(C) of the RFPA as added by section 501 of the bill requires the FBI Director to report semiannually to the intelligence committees of the Congress concerning all FBI requests for access to financial records made pursuant to the mandatory provisions added to the REPA by Section 501. This reporting requirement is in addition to the requirements contained in Title V of the National Security Act of 1947, which concerns congressional oversight of intelligence activities. The report should follow the model of the semiannual report required under the Foreign Intelligence Surveillance Act.

Paragraph 1114(a)(5)(D) ensures that no financial institution, or officer, employee, or agent of such institution, will disclose to anyone that the Federal Bureau of Investigation has sought or obtained access to a customer's or entity's financial records under the mandatory access provisions. The effective conduct of FBI counterintelligence activities requires such non-disclosure. The Committee expects the FBI, in implementing the new mandatory authority, to ensure that certificates executed pursuant to Paragraph 1114(a)(5)(A) by the Director of the FBI (or his designee) and shown to a financial institution to gain access to records, remain on file with the FBI, both to satisfy internal and congressional oversight needs and to provide protection from any possible legal liability for the financial institution.

State and Local Criminal Records

Section 502 would allow access for the FBI to state and local criminal records for national security purposes similar to that granted to the CIA, DOD, and OPM in the Intelligence Authorization Act for Fiscal Year 1986. The FBI has also faced difficulties in recent years in obtaining criminal records information from state and local agencies for purposes of conducting background investiga-

tions, primarily because of state and local legislation triggered by, and similar to, the Privacy Act.

An example of the difficulty in obtaining criminal history record information for purposes of conducting a background investigation can be found in one State where the FBI's offices have been precluded from access to the criminal justice information system for the purpose of conducting background investigations because the State's Department of Justice has interpreated the State's Freedom of Information/Privacy Acts, which prohibit use of information developed by law enforcement agencies for other than law enforcement purposes, to exclude background investigations from the realm of law enforcement purposes. Even with a release from the applicant, some information has been withheld.

Other states have similar laws restricting the use of criminal record information for employment purposes. To date these laws have not been interpreted to preclude FBI access to the records for the purpose of conducting background investigations. There is no guarantee, however, that these states may not take a different position in the future. A change in position by these states to deny the FBI these records could drastically reduce the ability of the FBI to obtain complete criminal record information for background investigations.

To address these current and potenital problems section 502 adds the FBI to those agencies entitled under section 9101 of title 5, United States Code, to obtain access to state and local criminal history records. This will ensure that the FBI can adequately fulfill its responsibilities in conducting background investigations.

Telephone Toll Records

Section 503 amends chapter 33 of title 28, United States Code, to grant the FBI authority to obtain telephone subscriber information or toll billing record information from a communications common carrier for counterintelligence purposes if the Director of the Federal Bureau of Investigation (or the Director's designee) finds that there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is or may be a foreign power or an agent of a foreign power as defined in the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801).

The legislative history of the Foreign Intelligence Surveillance Act explains the vital importance to the FBI of information about the communications used by persons engaged in espionage or international terrorism. That Act provides authority for the FBI to monitor such communications by acquiring the contents of a wire communication or by other means that would require a warrant for law enforcement purposes. The FBI does not currently possess any similar mandatory authority for access to telephone subscriber information or toll billing record information. Section 503 provides the mandatory access the FBI needs to perform its counterintelligence functions effectively.

The FBI has stated that most communications common carriers cooperate voluntarily with the FBI in making available telephone subscriber information or toll billing record information. Currently,

to gain access to such records, the FBI issues a letter, called a "national security letter," signed by an appropriate supervisory official and seeking telephone subscriber information or toll billing record information relevant to FBI counterintelligence activities. Pursuant to an agreement reached approximately ten years ago between the Department of Justice and AT&T, national security letters are generally sufficient to provide access to such information without use of subpoenas in counterintelligence investigations. However, the FBI has advised the Committee that in certain significant instances, communications common carriers have declined to grant the FBI access to such records. The FBI informed the Committee that the problem occurs particularly in States which have laws or regulatory bodies prohibiting communications comon carriers from granting such access.

Section 503, by providing for mandatory FBI access to telephone subscriber information or toll billing record information for counterintelligence purposes in certain circumstances, preempts State laws or regulatory orders to the contrary which otherwise would not permit such access. The mandatory nature of the provisions also protects communications common carriers from the possibility of liability under State privacy law.

Section 503 amends chapter 33 of title 28, United States Code, by adding to it a new section 538 on "Counterintelligence Access to Telephone Toll Records."

Subsection 538(a) as added by section 503 of the bill provides that communications common carriers shall comply with an FBI request for access to telephone subscriber information or toll billing record information upon receiving the certificate in writing of the Director of the FBI (or the Director's designee) that the FBI seeks the records for foreign counterintelligence purposes and that there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is or may be a foreign power or an agent of a foreign power as defined in the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801). The term "entity" includes all forms of organizations, such as partnerships, associations, corporations, and governments. The term "foreign counterintelligence purposes" includes both the purpose of countering intelligence activities of foreign powers and their agents and the purpose of countering international terrorist and activities.

The Committee expects that, if the Director of the FBI delegates his function under this provision, he will delegate it no further down the FBI chain of command than the level of Deputy Assistant Director. The Committee also recognizes that the Director may delegate to the head or acting head of an FBI field office the authority to make the required certification in exigent circumstances where time is of the essence, provided that the Director is notified as soon as possible of the circumstances involved.

The new mandatory FBI authority for counterintelligence access to records is in addition to, and leaves in place, existing non-mandatory arrangements for FBI access based on voluntary agreement of communications common carriers. Although the existing FBI non-mandatory arrangements require only that a "national security letter" state that the requested information is relevant to FBI

counterintelligence activities regardless of the status or activities of the person to whom the information pertains, the Committee believes it important in establishing the additional authority for mandatory FBI access to limit that mandatory authority to use only to obtain records where there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is or may be a foreign power or an agent of a foreign power. The Committee notes that the requirement of "reason to believe" is less stringent than the requirement of "probable cause" which is used as the standard for authorization of electronic surveillance under the Foreign Intelligence Surveillance Act. The federal courts have not required either a judicial warrant or a probable cause standard for access to telephone subscriber information or toll billing record information. *Reporter's Committee for Freedom of the Press* v. *AT&T*, 593 F.2d 1030 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979). The Committee believes that both First and Fourth Amendment principles are fully satisfied by requiring a determination that there are specific and articulable facts giving "reason to believe" that the person or entity to whom the information sought by the FBI pertains is or may be a foreign power or an agent of a foreign power. The meaning of "reason to believe" in section 503 is the same as in section 501.

In addition, the Committee recognizes that in some circumstances the target of an investigation may use the telephone of another person. Therefore, the Foreign Intelligence Surveillance Act authorizes the surveillance of a telephone line based on its use by a foreign agent, whether or not the telephone is listed in the foreign agent's name. For the same reason, section 503 authorizes access to telephone subscriber information or toll billing record information which pertains to a foreign power or an agent of a foreign power who is believed to use a particular telephone, whether or not the telephone is listed in the name of the foreign power or agent of a foreign power.

Subsection 538(b) as added by section 503 of the bill provides that the FBI may disseminate information obtained pursuant to the mandatory access provisions only as provided in the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations, and, with respect to dissemination to an agency of the United States, such as another federal law enforcement or intelligence agency, only if the FBI determines that such information is clearly relevant to the authorized responsibilities of such agency. The requirement of clear relevancy for dissemination to another federal agency ensures that the FBI will not automatically and routinely disseminate telephone subscriber information or toll billing record information the FBI obtains from a communications common carrier using the mandatory procedures.

Subsection 538(c) as added by section 503 of the bill requires the FBI Director to report semiannually to the intelligence committees of the Congress concerning all FBI requests for access to telephone subscriber information or toll billing record information made pursuant to the mandatory provisions added to title 28 by section 503. This reporting requirement is in addition to the requirements contained in Title V of the National Security Act of 1947, which concerns congressional oversight of intelligence activities. The report

should follow the model of the semiannual report required under the Foreign Intelligence Surveillance Act.

Subsection 538(c) ensures that no communications common carrier, or officer, employee, or agent thereof, will disclose to anyone that the FBI has sought or obtained access to telephone subscriber information or toll billing record information under the mandatory access provisions. The effective conduct of FBI counterintelligence activities requires such non-disclosure. The Committee expects the FBI, in implementing the new mandatory authority, to ensure that certificates executed pursuant to subsection 538(a) by the Director of the FBI (or his designee) and shown to a communications common carrier to gain access to information, remain on file with the FBI, both to satisfy internal and congressional oversight needs and to provide protection from any possible legal liability for the communications common carrier.

TITLE VI—PROTECTION OF UNITED STATES INTERESTS

Since 1984, the Committee has sought the establishment of national policies to restrict the presence in the United States of intelligence officers from the Soviet Union and other nations whose intelligence activities within the United States are contrary to our national interests. The Intelligence Authorization Act for FY 1985 contained a requirement that the President submit annual reports on the numbers and treatment of official representatives in the United States from those countries and on the numbers and treatment of U.S. representatives in those countries. The Intelligence Authorization Act for FY 1986 contained a provision offered by Senators Leahy and Cohen which establish a policy that the number of Soviet embassy and consular officials in the United States should be substantially equivalent to the number of U.S. embassy and consular officials in the USSR. The fundamental purpose of these provisions was to achieve, through a policy of equivalence, a lessening of the burdens placed on FBI counterintelligence by the large number of intelligence officers operating under official cover in the United States.

While the Administration has taken some steps in this direction, the Committee is very disappointed with the response to the two legislative requirements. The first Presidential report under the FY 1985 Act was due in November, 1985, but has not yet been submitted to the Committee. The Committee has received from the Secretary of State and the Attorney General the plan for achieving "substantial equivalence" between U.S. and Soviet embassy and consular officials, but the plan does not meet the intent of the Committee as set forth in the Committee Report on the FY 1986 Act. The Report stated that the Executive branch should develop "an approach for attaining equivalence within a reasonable time through attrition of Soviet personnel in the United States, an increase in the number of American personnel in the Soviet Union, or a combination of both." The plan submitted to the Committee fails to reduce the number of Soviet embassy and consular officials in the United States. Instead, the plan provides for an increase in the numerical ceiling on Soviet personnel on the grounds that the Soviets need additional positions for their new consulate in New

York. Any additional staffing required for the New York consulate should be accomplished within the current 320 ceiling, and the ceiling itself should be gradually reduced by attrition.

To carry forward these efforts, the Committee is proposing three additional initiatives in this bill to control the hostile intelligence presence by broadening the scope of the Foreign Missions Act, by establishing a policy of "substantial equivalence" for the Soviet and U.S. Missions of the United Nations, and by requiring the registration of foreign-controlled commercial enterprises most likely to serve as cover for hostile intelligence or technology transfer operations.

Foreign Missions Act Amendment

Section 601 contains the text of S. 1947, a bill introduced by Chairman Durenberger and Vice Chairman Leahy in December, 1985, to enhance the protection of United States interests under the Foreign Missions Act.

The legislation is designed to ensure that the national security interests of the United States are safeguarded from the activities of corporations or other commercial entities controlled by foreign elements hostile to our country. Section 601 would clarify the definition of "foreign mission" in the Foreign Missions Act so as to remove any doubt that such commercial entities can be subjected to the controls in that act.

The adversaries of the United States have become adept at using commercial cover and business dealings for espionage purposes. The Select Committee on Intelligence and the Permanent Subcommittee on Investigations focused on counterintelligence issues throughout 1985. Senator Roth, the chairman of the Committee on Governmental Affairs and of the Permanent Subcommittee on Investigations, and Senator Nunn, the ranking minority member of that subcommittee, also are members of the Intelligence Committee, and there was excellent cooperation between the committees as both sought to identify, in concert with the executive branch, actions that could be taken to improve U.S. counterintelligence and security protections.

A number of important steps were taken during 1985, including an expansion of the Foreign Missions Act definition of "foreign mission" that was included in section 127 of the Foreign Relations Authorization Act for Fiscal Years 1986 and 1987 (Public Law 99-93, August 16, 1985). That change substituted the phrase "mission to or agency in" for the more restrictive term "official mission." Thus, while there may have been ambiguity previously, it now is clear that Foreign Missions Act controls can be applied to Soviet and Warsaw Pact state trading organizations such as the Soviet company AMTORG, because such organizations clearly are foreign government agencies performing governmental activities.

The remaining problem involves commercial entities that may not fall under the rubric of an agency or may not, at least ostensibly, be involved in diplomatic, consular, or other governmental activities, even if they are owned or controlled by foreign governments or organizations. The record indicates that such commercial entities are capable of engaging in or providing cover for activities

just as inimical to the United States as some of the activities of state trading companies.[1]

In order to prevent potentially dangerous commercial establishments from continuing to avoid Foreign Missions Act controls, section 601 makes several changes in the act's definition of "foreign missions." First the phrase "or entity" is added, so that the definition would state that foreign mission means any mission to or agency or entity in the United States. This would permit commercial establishments to be designated as "foreign missions" by categorizing them as "entities" rather than as missions or agencies. Next, section 601 would strike the word "governmental" from the text above clause (A) in 22 U.S.C. 4302(a)(4) and substitute the phrase "which is involved in" for the word "involving." This change would enable commercial entities to be subject to Foreign Missions Act restrictions on the basis of their involvement in any "activities" of a foreign government or organization; the current redundant and confusing specification that such activities must be diplomatic, consular, or governmental would be eliminated. Finally, the phrase "or which is substantially owned or effectively controlled by" is added to the definition, so that a commercial entity can also be subjected to Foreign Missions Act restrictions strictly on the basis of an ownership or control test.

The Committee believes that these changes are advisable to clarify the ability of the Secretary of State to apply Foreign Missions Act controls to commercial entities operating in the United States which are involved in the activities of foreign governments or organizations, or which are owned or controlled by such governments or organizations. It is clear that certain of these commercial establishments may be performing activities which pose a threat to U.S. national security. Those charged with defending U.S. interests must have the tools that they need to deal effectively with such threats.

It should be emphasized that section 601 would not require application of Foreign Missions Act controls to any commercial establishment. Instead the amendment made by section 601 would enable the Secretary of State to apply such controls in appropriate circumstances. Thus, commercial establishments engaged exclusively in legitimate business activities will not be affected. Section 601 would impact only on commercial establishments whose activities on behalf of foreign governments or organizations are inimical to U.S national security interests.

Soviet Mission at the United Nations

Section 602 expresses the policy of Congress that the number of Soviet nationals admitted to the United States to serve as members of the Soviet Missions at the United Nations (SMUN) shall not substantially exceed the number of U.S. personnel who serve as members of the U.S. Mission at the United Nations. The U.S. government can, of course, easily increase the U.S. staff available for work in connection with activities at U.N. Headquarters by assign-

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[1] See discussion of section 603, requiring that agents of Soviet bloc nations who are engaged in business register with the Attorney General. This provision is designed to enable counterintelligence agencies to identify and accumulate information about such commerical entities.

ing personnel from Washington on temporary duty, and therefore it is not practicable to seek absolute equivalence between the size of the U.S. and Soviet missions. For purposes of this section, the number of Soviet personnel at the SMUN would substantially exceed the number of American personnel at the USUN if it were one-third or more greater than the annual average number of U.S. personnel permanently assigned to the U.S. Mission to the U.N. or its specialized agencies in New York City.

The President could continue to admit a greater number of Soviets than allowd under this policy, but only if he determined that such admission of Soviet nationals would be in the interests of the United States. In the event a greater number continued to be admitted, the Secretary of State would be obliged to transmit to the intelligence and foreign relations committees of the Senate and House of Representatives six months after enactment and every six months thereafter a report setting forth the number of Soviet nationals admitted during the previous six-month period and a description of their duties with the SMUN. Further more, the Secretary of State and Attorney General are requested to prepare a report within six months of enactment of this section setting forth a plan to ensure compliance with the policy that the number of members of the SMUN not substantially exceed the number of members of the U.S. Mission.

The staff of the SMUN for purposes of this section include all members of the mission included in the definition of the term "members of the mission" in Article 1(b) of the Vienna Convention on Diplomatic Relations, done April 18, 1961—i.e., the head of the mission and the members of the staff of the mission, including the members of the diplomatic staff, of the administrative and technical staff and of the service staff. This is to make clear that, in implementing this section, the State Department in the computation of the number of members of the SMUN must include all its personnel.

A mission of a country to the United Nations includes all the missions of such country to the U.N. in New York City and includes missions in New York City to specialized agencies of the U.N. In the case of the Soviet Union, the SMUN specifically includes the missions to the United Nations of the Union of Soviet Socialist Republics, the Byelorussian Socialist Republic and the Ukrainian Socialist Republic.

A key part of the Soviet official presence in the United States is the large staff of the Soviet mission to the United Nations (SMUN) in New York City. The SMUN currently has a staff of some 295, about 260 of which are assigned to the primary Soviet mission and the others to the missions of the so-called Ukrainian and Byelorussian Soviet Socialist Republics. This is in addition to the more than 300 Soviet citizens who work for the U.N. Secretariat in New York. Combined with other categories of Soviet representatives—press correspondents, commercial representatives, exchange scholars and the like—this adds up to well over 600 Soviets currently assigned to the New York area, in addition to their families.

Counterintelligence specialists, especially in the FBI, say that the SMUN in New York City is one of the chief havens for Soviet spies in the United States. With its large staff, the SMUN provides a

major operational center for the KGB and GRU in their activities throughout the United States.

The Soviet mission greatly exceeds the size of other delegations to the United Nations. The next largest is the U.S. mission with a staff of about 130. China is third with a total of 125. All other missions to the United Nations—including many countries with extensive activities there—are well below this.

Not only does the size of the Soviet mission greatly exceed the others, but its structure differs as well. The SMUN has a bloated "support" staff of 120, many of whom do not have duties directly related to the United Nations. In fact, the United States Government has little official information on the nature of the activities pursued by the Soviets at their mission to the United Nations. The Soviets provide only the sketchiest information about the identities of personnel being sent to the SMUN, their positions in the mission, and their duties with respect to the United Nations.

The FBI believes that as with other Soviet organizations in the United States, more than one-third of the Soviet personnel at their U.N. mission—at least 100 people—are professional intelligence officers. The chief damage of this large intelligence component is espionage and other clandestine collection by the Soviets of defense, science and technology, and national security information within the Unites States. Their large presence at the United Nations also provides the Soviets a great opportunity to attempt to recruit foreign officials at the United Nations as their agents.

It is extremely difficult for the FBI to cope with the large number of Soviet officials and their family members in New York City—over 800 people. Operational conditions for the FBI in New York are poor. The FBI has difficulty getting its best agents to work in New York due to the high cost of living in the area. As a result, the FBI cannot effectively monitor the activities of all the Soviet officials stationed in New York in one capacity or another. If Soviet espionage is to be controlled, there must be substantial reduction in the size of the Soviet U.N. mission.

Chairman Durenberger and Vice Chairman Leahy, in a statement to the Permanent Subcommittee on Investigations on October 22, 1985, indicated that the Committee's ongoing review of counterintelligence and security problems had revealed that a key element in reducing the occurrence of espionage in the U.S. is reduction and restriction of the hostile intelligence presence in the U.S. For the most part, foreign intelligence officers in the U.S. operate under the cover of foreign diplomatic establishments and other official or quasi-autonomous entities controlled by foreign governments.

Members of the Intelligence Committee have been active in recent years in limiting the hostile intelligence presence in the U.S. The Huddleston-Leahy Amendment to the Fiscal Year 1984 Intelligence Authorization bill declared the policy of Congress to be that the numbers and treatment of diplomatic officials from countries engaged in intelligence activities against the U.S. should not exceed the equivalent numbers and conditions of American officials assigned to those countries. The Leahy-Cohen Amendment to the Fiscal Years 1986 and 1987 Foreign Relations Authorization Act further established in statute that with respect particularly to the

Soviet Union, the number of Soviet diplomatic and consular personnel admitted to the U.S. shall not substantially exceed the equivalent number of U.S. personnel in the Soviet Union. The Roth Amendment to the same Act authorized the Office of Foreign Missions of the State Department to regulate the travel of all U.N. employees outside the U.N. Headquarters District and in general directed the State Department to apply the same restrictions to U.N. employees as are applied to the foreign missions of their home countries.

Section 602 derives from S. 1773, a bill to limit the size of the SMUN. This bill was originally introduced by Senators Leahy and Cohen, and has nineteen additional Senate co-sponsors. The bill to limit the size of the SMUN was a logical successor to the earlier Leahy-Cohen bill on diplomatic equivalence and reciprocity with the Soviet Union. This is because by far the largest Soviet official establishments in the U.S. are the Soviet embassy and consulate, currently at 320 persons, and the Soviet mission to the United Nations.

The combination of these two measures will greatly impair the ability of the Soviet Union to conduct human intelligence operations in the U.S. As Stanislav Levchenko, a former high level officer in the KGB who defected several years ago, stated recently (Washington Times, Oct. 1, 1985):

> The most practical means of disrupting KGB operations in America is to require parity in the number of Soviet Diplomats in the United States and American diplomats in the Soviet Union, and to limit drastically the size and operations of the huge Soviet mission to the United Nations.
>
> If such steps lead to a reduction of 100 or more Soviet officials, KGB activities in the United States would be seriously damaged. The KGB would lose many officers who otherwise would be handling active cases. But Moscow still would need to maintain contact with various offices of the U.S. government. So more of the remaining officials would be occupied with legitimate diplomatic activities, rather than with espionage.

On March 7, 1986, the State Department announced that it would require the Soviet Union to reduce the number of personnel at the SMUN from 275 to 170 by April 1, 1988. The Department has indicated that if the Soviets do not comply voluntarily with the order, then the Department will proceed to implement it through denials of new requests for admission to the United States of members of the SMUN. In taking this action, the State Department was acting on a mandate developed by the Administration through the National Security Council.

Enactment of Section 602 remains necessary even after the recent action of the State Department. As an administrative measure the State Department decision is subject to modification in the future. Over the years, a large number of Soviets have been permitted to enter the U.S. as diplomats and consular officers, members of the SMUN, representatives assigned to quasi-nongovernmental entities such as trade associations and press bureaus, and visiting officials. It is, therefore, desirable to apply definite statuto-

ry limitations on such admissions whenever possible. In the case of the SMUN, there is no difficulty in establishing reasonable limits on its size, vis-a-vis and U.S. Mission, by requiring that the size of the SMUN be substantially equivalent to that of the U.S. Mission, taking into account that as a result of the special circumstances, the size of the SMUN may be considered substantially equivalent to that of the U.S. Mission provided it does not exceed it by more than one-third.

The clear authority of the U.S. to take such an action on national security grounds rests largely on previous Congressional attention to this matter. Specifically (as explained in greater length below), Congress adopted legally binding reservations to both of the principal international agreements governing the status of the U.N. and national missions to it in the United States. These reservations were designed to preserve the U.S. right to protect its national security through reasonable limitations on the privileges of the U.N. organization and national missions to the U.N.

The basic principles governing the obligations of the United States toward the United Nations and national missions to the organization are the general Convention on the Privileges and Immunities of the United Nations—the general convention—adopted in 1946 but not ratified by the United States until 1970, and the agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations—the headquarters agreement—adopted by joint resolution of the Senate and the House or Representatives in 1947.

Neither of these agreements, as submitted to the Congress, contained explicit provisions permitting the United States to restrict the activities of the U.N. organization or the national missions to the United Nations based on national security grounds. But Congress, in approving the agreements, adopted legally binding reservations to both the general convention and the headquarters agreement preserving U.S. rights to protect its security. Section 6 of Public Law 80-357 which adopted the headquarters agreement, states:

> Nothing in this agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States to safeguard its own security.

The U.S. Government has specifically maintained, both in principle and through its actions, that section 6 permits the U.S. Government to control the entry of foreign nationals into the United States in connection with the United Nations, including not only national missions to the United Nations but also employees and invitees of the United Nations itself. A valuable collection of materials on the development of U.S. policy in this regard is contained on pages 195-312 of the State Department publication, "Foreign Relations of the United States 1952-1954," volume III, United Nations affairs (1979).

The claim has been advanced from time to time that the U.S. may act against the admission of particular persons to the U.N. or national missions to the U.N., but not with respect to the overall size of missions. As host country for U.N. Headquarters, however, the U.S. retains the inherent power (as well as the legal authority

arising from Congressionally-mandated reservations to the pertinent international agreements) to regulate such missions when their size and the conduct of their personnel raise legitimate national security concerns. The State Department has now agreed to this proposition through its recent action.

The key issue is the principle of reasonableness in interpreting the responsibilities of the U.S. Government under the general convention and the headquarters agreement. The agreements simply cannot be read to prevent the United States from taking reasonable measures to protect its national security by refusing to tolerate an abnormally large mission serving as a base for highly damaging espionage. There are an extraordinary number of Soviet officials assigned to the SMUN, many of whom appear too highly qualified for their official work as janitors, groundkeepers, and the like. The United States clearly has the right under our agreements concerning the United Nations to take an overall look at this situation and put restraints on the size of the SMUN that would ensure that it remains reasonable in light of its structure and legitimate activities at the United Nations.

Further information concerning the legal situation on limiting the size of the SMUN can be found among the materials printed in the Congressional Record at the time the original bill S. 1773 was introduced. (See Cong. Rec., October 8, 1985, pp. S13573–S13583.)

Registration of Agents of Certain Foreign Governments

Section 603 amends 18 U.S.C. 951, which makes it a criminal offense for an agent of a foreign government to fail to register with the Attorney General. Current law exempts diplomats and other officials as well as one engaged in a "legal commercial transaction." Section 603 would narrow the exemptions by adding new subsection (e), which would require registration by those engaged in commercial transactions who are agents of the Eastern bloc nations, specifically, the Soviet Union, East Germany, Hungary, Czechoslovakia, Poland, Bulgaria, Romania, or Cuba, or those who have been convicted of espionage or export law violations.

The section derives from S. 1900, which was introduced by Senator Roth (for himself and Senators Nunn and Cohen) on December 2, 1985. S. 1900 would have amended the Foreign Agents Registration Act (FARA), which, like 18 U.S.C. Section 951, requires that agents of foreign nationals register with the Attorney General. (FARA likewise exempts diplomatic and other officials and those engaged in commercial transactions.) Senator Roth, as Chairman of the Permanent Subcommittee on Investigations, held hearings and heard testimony that commercial entities are regularly used as fronts by Soviets and their bloc allies. Current reporting statutes are intended to provide the Government with information about the activities of foreign agents. But they impose no such requirement on Soviet and Soviet-bloc businesses or even persons convicted of espionage violations. While those businesses are ostensibly engaged in non-political activity, it is common knowledge that the businesses are used as cover for espionage operations. S. 1900 was intended to provide information to the Government to enable it to

protect itself and its citizens from the activities of agents of hostile foreign powers.

Following discussions with the Department of Justice, Senator Roth agreed that because there are a number of reporting statutes, a better approach would be to amend the Code section directed at those engaged in espionage.[1] Accordingly, Senator Roth developed an alternative proposal, now included as Section 603. The section accomplishes the two goals of S. 1900—requiring the registration of those engaged in business but working for Soviet bloc nations and also those previously convicted of espionage violations—but preserves the distinction between registration requirements for political representatives and spies.

Section 951 of title 18, U.S.C. currently requires prior notification to the Attorney General by any person who acts in the United States as an agent of a foreign government, with four exemptions spelled out in subsection (d), which defines "agent of a foreign government" to mean:

> an individual who agrees to operate within the United States subject to the direction or control of a foreign government of official, except that such term does not include—
>
> (1) a duly accredited diplomatic or consular officer of a foreign government, who is so recognized by the Department of State;
>
> (2) any officially and publicly acknowledged and sponsored official or representative of a foreign government;
>
> (3) any officially and publicly acknowledged and sponsored member of the staff of, or employee of, an officer, official, or representative described in paragraph (1) or (2), who is not a United States citizen; or
>
> (4) any person engaged in a legal commercial transaction.

Under current law, the Attorney General is authorized to promulgate rules and regulations establishing requirements for notification. In addition, the Attorney General is required, upon receipt, promptly to transmit one copy of each notification statement filed under section 951 to the Secretary of State for such comment and use as the Secretary of State may determine to be appropriate from the point of view of the foreign relations of the United States. Failure of the Attorney General to do so is not a bar to prosecution under section 951. Violations are punishable by a fine of not more than $75,000 or imprisonment for not more than ten years, or both.

Section 603 of this bill amends section 951 of title 18 by adding a new subsection (e) which provides that, notwithstanding the exemption in paragraph (d)(4) for persons engaged in legal commercial transactions, a person engaged in such a transaction shall be considered an agent of a foreign government if such person agrees to operate within the United States subject to the direction or control of a foreign government or official and such person meets one of two criteria. The first is that the person is an agent of the Soviet

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[1] FARA was originally aimed at subversives and propagandists, and required that all representatives of foreign governments register. Over time, it has been limited to those who attempt to influence public opinion or government action. Other laws, including 18 U.S.C. 951 and 50 U.S.C. 85–1, have focused on subversives and those engaged in espionage.

Union, the German Democratic Republic, Hungary, Czechoslovakia, Poland, Bulgaria, Romania, or Cuba, unless the Attorney General after consultation with the Secretary of State determines and so reports to the Congress that the national security of foreign policy interests of the United States require that the provisions of section 951 should not apply in specific circumstances to agents of such countries. The second criterion is that the person has been convicted of, or has entered a plea of nolo contendere with respect to, any offense under sections 792 through 799, 831, or 2381 of title 18 or under section 11 of the Export Administration Act of 1979, or is the employer of such a person, except that the provisions of section 951 shall not apply to such a person or employer for a period of more than five years beginning on the date of the conviction or the date of the entry of the plea of nolo contendere.

The Committee intends that the registration of a person under subsection (e) should be the basis for the State Department to impose appropriate requirements under the Foreign Mission Act, as amended by section 601 of this bill. The Committee also recognizes that the Attorney General has the authority under subsection (b) of section 951 to establish whatever requirements for notification he may deem justified.

The Committee further intends that the requirement for notification by a person engaged in a legal commercial transaction should apply to a person employed by a commercial entity that transacts business in the United States, without regard to whether such person might be considered an officially and publicly acknowledged and sponsored official or representative of a foreign government under subsection (d)(2) or a member of the staff, or employee of, such an official or representative under subsection (d)(3). The purpose is to require notification by officials, representatives, staff members, and employees of commercial entities, whenever such persons engage in commercial enterprises and agree to operate in the United States under the direction or control of one of the named countries. The current exemptions in subsections (d)(2) and (d)(3) should not be applied to defeat the objective of this bill to enhance U.S. counterintelligence efforts.

TITLE VII—GENERAL PROVISIONS

Section 701 provides that the authorization of appropriations by the fiscal year 1987 Intelligence Authorization Act shall not be deemed to constitute authority for the conduct of any intelligence activity which is not otherwise authorized by the Constitution or laws of the United States.

Section 702 provides advance authorization for such additional appropriations as may be necessary for increases in Federal employee compensation and benefits which are authorized by current or subsequently enacted law during fiscal year 1987. Section 702 obviates the necessity for separate authorizations for such matters during the fiscal year.

Committee Action

On May 15, 1986, the Select Committee on Intelligence, a quorum being present, approved the bill as amended and ordered it favorably reported.

Evaluation of Regulatory Impact

In accordance with Paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee finds no regulatory impact will be incurred in implementing the provisions of this legislation.

Congressional Budget and Impoundment Control Act

The Committee has complied with Section 403 of the Congressional Budget and Impoundment Control Act of 1974 to the extent possible.

Changes in Existing Law

In the opinion of the Committee, it is necessary to dispense with the requirements of Section 12 of Rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

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